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ABSTRACT

The paper reviews aspects of preschool special education from three perspectives: (1) existing federal and state laws, (2) the state of the art, (3) legal decisions and implications. Discretionary interpretations of the Education for All Handicapped Children Act of 1975 and the Rehabilitation Act of 1973 (Section 504) regarding preschool special education are cited. Ways in which states choose to exercise other discretionary rights and their effects on services are noted. The concept of appropriate education as ruled by the Supreme Court in the "Board of Education of the Hendrick Hudson Central School District vs. Rowley" is analyzed along with research results which suggest that for many handicapped preschoolers, half-day programs meet the requisite of a free appropriate public education. Issues in mainstreaming are examined and weaknesses of efficacy studies on the topic are noted. Social benefits of mainstreaming are cited. The paper concludes with an analysis of a public school system's legal duty to provide mainstreaming to preschool handicapped children when it does not provide services to nonhandicapped students of the same age. (CL)

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PRESCHOOL PROGRAMMING: A LEGAL AND EDUCATIONAL DISCUSSION OF MAINSTREAMING AND INTENSITY OF SERVICE ISSUES

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INTRODUCTION

Early childhood/special education has long been accepted in the educational community as an effective intervention strategy to lessen or eliminate the negative effects of handicapping conditions. Given this philosophical educational base, the federal government has supported early childhood special education programs since 1968 through a series of acts designed to provide grants and contracts "for the development and implementation of experimental projects in early education for handicapped children" (Swan, 1981, p.3). The Handicapped Children's Early Education Program (HCEEP), begun in 1968 and continuing today, has supported demonstration/ dissemination programs, joining with the Research Projects Branch in supporting research projects and institutes to examine longitudinally the efficacy of special education for preschool-aged children.

In addition to HCEEP, the Education for All Handicapped Children Act of 1975, better known as Public Law 94-142 (P.L. 94-142), further supports the generally accepted belief in the need for early intervention programs for handicapped children. It requires services for handicapped school aged children, mandates Child Find efforts from birth, and mandates services for handicapped children from three to five years of age, unless such services would be inconsistent with existing state law, state practice, or court order. It also includes a financial incentive to state educational agencies (SEAs) and local educational agencies (LEAs) for developing or expanding services to very young handicapped children.

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Unfortunately, even with this strong federal commitment to early intervention for preschool-aged handicapped children, the actual wording of P.L. 94-142 makes consistent interpretation by SEAs and LEAs difficult. Many of its provisions are worded such that they seem applicable only to school age youngsters. This has led to many questions, and, in some LEAs and SEAs mandating services to handicapped children from birth, to costly and time consuming litigation.

Although numerous legal questions and issues have been raised in preschool special education cases, two specific issues are paramount. They are:

* The intensity of program-frequency and length of day, and
* Mainstreaming, in terms of education of handicapped with nonhandicapped students.

This paper will review these two issues from three perspectives: (1) existing federal and state laws, (2) the state of the art and, (3) legal decisions and implications.

APPLICABLE LAWS

Public Law 94-142 specifically establishes the age limitations for preschool youngsters who are entitled to a free appropriate public education. The law specifies:

> [A] free appropriate public education will be available for all handicapped children ... between the ages of three and twenty-one ... except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State; ... (See 20 U.S.C. 1412(2)(B); see also the Regulations implementing P.L. 94-142, 34 CFR 300.122 and 300.300).

Therefore P.L. 94-142 allows special education services to handicapped students between the ages of three and five to be discretionary with the respective states.

This discretionary interpretation is compatible with the Rehabilitation Act of 1973 (Section 504), which is a second federal statute dealing with educational rights of handicapped students. The Office for Civil Rights (OCR), which is charged with the responsibility of interpreting Section 504, has further reinforced the discretionary rights of SEAs by stating in response to a 1983 letter of inquiry, that:

> Section 504 does permit each state to determine the legal age limit for educating handicapped students ... The Regulation defines a qualified handicapped person with respect to public educational services ... as follows:
>
> > "Qualified handicapped person" means: ...a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under State law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under ... the Education of the Handicapped Act.

Thus, it should be noted, that under the first provision (i), a school system must offer education to handicapped children if education is offered to nonhandicapped children of the same age group.

Due to the foregoing statutory enactments, many states have chosen to provide special education services to handicapped children under the age of five. The means by which a state chooses to exercise this discretionary right can have significant impact on its ultimate responsibilities. For example, some states such as Maryland provide that special education services are to be made available to all handicapped children

from birth through the age of twenty. Other states have left it to local school systems to decide the matter.

The Regulations implementing P.L. 94-142, 34 CFR 300.300 delineate the conditions under which states can choose to serve or not to serve specific groups of children. For example, one condition is that if education is provided to a certain age group of nonhandicapped children under five years of age, it must equally be offered to handicapped children in that age group.

Assuming that a state has decided to exercise its discretionary right and has specified that school systems are to provide special education services to handicapped children under the age of five, several questions remain unanswered. Must handicapped preschool-aged children be provided with all of the services encompassed within a free appropriate public education, including entitlement to be educated with nonhandicapped children (i.e., mainstreaming)? If so, what in fact constitutes an appropriate program for a handicapped child as young, perhaps, as a few days old?

APPROPRIATE EDUCATION

In the case of Board of Education of the Hendrick Hudson Central School District vs. Rowley [458 U.S. 176 (1982)], the United States Supreme Court stated that P.L. 94-142 was intended more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside. Specifically the court stated that an "appropriate" program is one which is "reasonably calculated to enable the child to receive educational benefits". While that definition lacked any objective specificity, it did make clear that school systems are not required to provide the "best" possible programs to handicapped children. In fact, the court noted that the law does not

require a state to maximize the potential of each handicapped child commensurate with the opportunity provided to nonhandicapped children.

However, parents want what is "best" for their children, often with the thought that if "some" is good, "more" is better. The law does not provide for "more" or "best"; rather it speaks in terms of appropriateness, i.e. reasonably calculated to enable the child to receive educational benefits. These discrepant points of view often create problems between parents and school systems, for many parents believe full-day programs will be of greater benefit to their children than half-day programs, regardless of the type or severity of the handicapping condition or the age of the child.

Although considerable research has examined the issue of efficacy of early intervention for preschool children, generally, only a few studies examined length of day and intensity of treatment (Ramey and Bryant, 1982; Taylor, White, and Pezzino, 1984). Taylor, et.al, (1984), found in their study of three to five year old communicatively disordered (C.D.) children and mentally retarded (M.R.) children, some, but not dramatic, improvement in expressive language scores for C.D. children due to the extra time provided in full-day rather than half-day programs. However, M.R. children in half-day programs scored higher on cognitive and expressive language subtests than M.R. children in full-day programs. When separate analyses of variance (ANOVAs) were run for both the C.D. and M.R. children, no statistically significant differences were found between half and full-day programs for either group (Taylor, et al, 1984). Additional data from this study indicated that the amount of engaged learning time in a full-day program was not much higher than that in a half-day program. This was thought to be due to more frequent breaks and the fact that the primary afternoon activities in full-day programs were lunch and naptime (Taylor, et al, 1984). These research results support a finding that for many handicapped

preschool-aged children, half-day programs meet the requisite of a free appropriate public education.

An administrative hearing on this subject in Maryland involved a four year old handicapped girl, diagnosed at an early age as having Down Syndrome. She had been enrolled in an infant stimulation program, then enrolled in a Maryland public preschool education program in January 1983, attending twice-a-week, two hour sessions through June 1983. She continued in that program for the 1983-84 school year, with an increase to three days per week, two hour sessions of special education and the related services of physical therapy, occupational therapy, parent training and counseling, and speech and language therapy continuing. For the 1984-85 school year, the school system recommended continuation in the same program, noting that the frequency and intensity of the program were now increased to five half days per week with the same related services provided. The parents disagreed with the recommended placement, requesting that the child be enrolled in a nonpublic school which provided services five days per week for five hours each day, and contending that their child needed a full-day program to receive appropriate services. Hearings ensued.

The hearing officers concluded that the half-day program did indeed constitute a free appropriate public education. The decision was based on documented evidence presented by the school system that this youngster had achieved reasonable progress in the various developmental areas in the program in prior years and that the rate of such growth was reasonable in light of this youngster's handicapping conditions. The child's classroom teacher testified that the child became rather distractable after two hours in the program and there was no evidence that additional time in the classroom would result in any further educational benefit. With this testimony in mind, the hearing officers found that the program was appropriate, concluding:

"There [is] no research data identified ... to support the contention that preschool children make more progress when they are in school for five hours a day versus two and one-half hours per day. Individuals who have worked with [the child, i.e. the classroom teacher] support that she does not respond well when the structured learning situation extends too long".

In determining if a full-day program is necessary for a particular preschool handicapped child to receive an appropriate education, one must consider the child's past and present progress, research which presently does not support the conclusion that a full-time program will necessarily result in additional educational benefits, and, an individual child's specific educational needs.

MAINSTREAMING

Public Law 94-142 specifically states that school systems are required:

[T]o assure that, to the maximum extent appropriate, handicapped children,... are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ..." [20 U.S.C. 1412 (5)(B)].

Educating handicapped youngsters with nonhandicapped has come to be called "mainstreaming", with "mainstreaming" frequently being used interchangably with the term "least restrictive environment" (LRE). The terms are not synonymous and LRE encompasses much more; however, it is widely used this way and, since the law does not specify any particular age group of handicapped children for whom this "mainstreaming" requirement applies, it must be assumed that it applies, depending on the child's state of residence, to preschool-aged handicapped children.

The issue of mainstreaming is very ambiguous and complex when considered relative to preschool handicapped children. Turnbull (1982) states that generally, for a handicapped child to be mainstreamed, two criteria must be met: physical inclusion in a regular class (for an unspecified portion of the day), and functional inclusion as evidenced by social and instructional interaction with nonhandicapped students.

She emphasizes that with some young handicapped children, the relative restrictiveness of some specialized programs may be a prerequisite to enable them to function in a less restrictive environment in the future. Thus, the needs of an individual preschool-aged child may preclude interaction with normal peers or access to the regular education program, and the relative restrictiveness of an environment must be judged on an individual basis (Turnbull, 1982). She also points out that:

> [at the preschool level at least] mainstreaming lacks conceptual clarity and valuative criteria, program goals and objectives have no consensus backing, and the unanswered questions in terms of program outcomes are substantial. (p. 289).

Results of research on efficacy of integration of preschool-aged handicapped and nonhandicapped students are equivocal. A recent analysis of special education early childhood projects approved by the Joint Dissemination Review Panel (JDRP), found that little could be concluded about the efficacy of early intervention projects generally, due to the frequency of serious methodological weaknesses (White, et al., 1984). Guralnick concluded that in spite of a number of efficacy studies examining the effects of integrating handicapped and nonhandicapped preschoolers, it simply was not known whether it worked or not (Guralnick, 1981a), and O'Connell has cautioned that while research into the effects of integrating handicapped and nonhandicapped preschool-aged children is increasing, results must be interpreted carefully, for a

variety of factors contribute to the benefit or lack of benefit from integration (O'Connell, 1984).

Generally, the only documented benefit from integration of handicapped and non-handicapped preschool-aged children seems to be in the social domain. Research on the social effects suggests that the degree of social integration is a function of the severity of the handicapping condition. It was found that the amount of social integration decreased as the developmental levels of the handicapped children decreased and that implementing integration was very difficult when children with severe delays were involved. Social interactions of nonhandicapped children with severely and moderately impaired children were much less frequent than those directed towards mildly handicapped children (Guralnick, 1981b). Additional research has found that many handicapped children are seen by both nonhandicapped adults and other children as unattractive. This perception by the nonhandicapped has been found to create a significant disadvantage for the handicapped in mainstream classrooms. Langlois and Downs (1979) found that judgments based on physical appearance seemed to elicit aggressive behavior patterns and high activity level and that these patterns were associated with children who were unattractive physically. Thus, negative expectations possibly being conveyed from adults or nonhandicapped classmates should be considered when making decisions regarding integration of handicapped and non-handicapped children; perhaps even being given greater consideration when the handicaps of the children are in the moderate to severe range.

In a recent analysis of preschool social behaviors, Faught, Balleweg, Crow, and Van Den Pol (1983), found that: "In all categories of social interaction, handicapped children engaged in the largest proportion of free play intervals with handicapped peers, while nonhandicapped children spent the largest portion of their time playing

with other nonhandicapped children" (p.212). Their results agreed with those of earlier studies by Peterson and Haralick (1977), finding that while some degree of social integration occurs, there is a clear preference of children to interact with their similar classmates and that there are less complex interactions between nonhandicapped and handicapped youngsters than there are between nonhandicapped. Additional research on social interaction of handicapped and nonhandicapped preschool-aged children has suggested tentatively, that: some degree of social interaction can occur in mainstreamed settings; the amount and quality of social interaction may be significantly less than in a "regular" preschool; there may be some value in using "prompting" of the nonhandicapped to encourage them towards integrative play with the handicapped (however Offner, et al. stress that more research is needed on how to maintain the "prompt" effect, since it extinguishes over a short time); and teacher aides may be able to arrange the play environment in a way to enhance social interaction (Van Den Pol, Crow, Rider, & Offner, 1985).

Regardless, however, of the inconclusive research results [about the benefits of mainstreaming for preschool-aged handicapped students], Public Law 94-142 would appear to mandate full mainstreaming opportunities for preschool handicapped children equal to those of school aged handicapped children. The problem, however, is that most states which provide such preschool programs for handicapped children do not provide "regular education" for nonhandicapped preschool-aged children.

As recently as October, 1984, the Federal Office of Special Education which has the responsibility of interpreting P. L. 94-142 was asked, what is the responsibility of local school systems to provide preschool handicapped children with mainstreaming where there is no public school program for nonhandicapped students under the age of five? The response of the Office was:

> [Public Law 94-142 does] not require a ... SEA or ... LEA to establish preschool programs for nonhandicapped children. Nor does [it] require an SEA or LEA to enter into extensive contractual arrangements with private facilities for the sole purpose of implementing [mainstreaming opportunities]. This policy, however, does not relieve a State of its statutory responsibility to implement the [mainstreaming] provisions ... with regard to preschool handicapped children. In the absence of public preschool programs for nonhandicapped children, there are a number of ways an SEA or LEA could meet the [mainstreaming] requirements, such as linking the preschool handicapped programs to preschool programs for nonhandicapped children operated by other public agencies (such as Head Start), or by locating preschool handicapped programs in regular elementary school buildings. This remains the current policy of the Department.
>
> Although SEAs and LEAs have a certain amount of flexibility about the method of meeting the [mainstreaming] requirements, they must ensure that each handicapped child's placement is based on the child's unique needs as specified in the individualized education program (IEP) ...

The statements in this opinion letter seem conflicting. On the one hand, it appears that school systems are not required to establish preschool programs for nonhandicapped children or to contract with private schools in order to provide mainstreaming for handicapped preschool children. On the other hand, school systems are not relieved from the responsibility of providing mainstreaming for handicapped students. There is, however, a logical reconciliation of these statements. As previously noted, the mandates of the Federal regulations require that if SEAs and LEAs provide education programs to certain nonhandicapped preschool youngsters they

must also do so for certain handicapped preschool children. If such a situation exists, then mainstreaming opportunities are automatically available, since both handicapped and nonhandicapped children are enrolled in public school programs. However, if the school system has no programs for preschool nonhandicapped children, then the Federal Office of Special Education has determined that the SEA and LEA must, if possible, coordinate its preschool handicapped programs with other existing public services and programs such as Head Start which then would be available for mainstreaming purposes. If, however, none of this can be, it would appear that according to the Office of Special Education, then school systems are not required to create preschool programs for nonhandicapped children or to enter into contracts with private facilities for the sole purposes of implementing the mainstreaming requirement. Thus, it would seem that there is a mainstreaming requirement for preschool handicapped children only to the extent that existing public services can be coordinated so as to make it available. It is interesting to note that the mainstreaming requirments of Public Law 94-142 state that unless necessary, there shall not be a "removal" of handicapped children from the regular education environment. It would seem to follow that if a school district does not provide regular education programs for nonhandicapped preschool-aged children, then the handicapped child is in fact not "removed" from regular education programs. As such, there would not appear to be a violation of the mainstreaming mandate if a school system does not provide regular education programs for nonhandicapped preschool-aged children.

A Maryland Hearing Review Board squarely addressed the subject of a public school system's legal duty to provide mainstreaming to preschool-aged handicapped children when it does not provide services to nonhandicapped students in the same age bracket. The Board specifically indicated:

Since both parties devoted considerable discussion [during the hearing] to the application of [mainstreaming] to preschool programs, [we] wish to comment further on this issue. The Education for All Handicapped Children Act requires that: to the maximum extent appropriate, handicapped children, ... are educated with children who are not handicapped ... The parent's attorney claims that this provision confers on [the student] the right to be educated in a preschool program with nonhandicapped children. Counsel for [the public school system] pointed out that Federal and State law[s] require preschool programs only for handicapped children and [do] not require local education agencies to extend preschool programs to nonhandicapped children ... If the parent's attorney is correct, the law would achieve indirectly what it does not require directly, namely that preschool programs be extended to nonhandicapped children. The Hearing Review Board does not believe that this result was intended by the law ... When [the student] is ready for elementary school, she has the right to be placed in a regular kindergarten or first grade class with nonhandicapped children, to the maximum extent appropriate ...

CONCLUSION

The drafters of P.L. 94-142 imposed numerous mandates upon state and local school systems. The question of whether all or some of these mandates are applicable or appropriate to preschool handicapped children remains unanswered. Although administrative and judicial decisions have provided some direction, it can be anticipated that litigation will continue. This, however, is not a productive means of solving those unanswered questions. Rather, there is a tremendous need for more methodologically sound research into the actual benefits of special education for

handicapped young children. In particular, areas to be addressed include: the negatives or benefits of longer program days, the effects of integration of handicapped and nonhandicapped children in developmental skill areas other than social interaction, and the unanswered questions regarding long term effects of such program decisions. Research results could then be used to guide the implementation and evaluation of such programs. While methodologically sound research will be of significant value, the ultimate question will always be the individual needs of the particular preschool handicapped child. Certainly, an appropriate program for some youngsters may require both a full day program and mainstreaming. If a full day program is required, it appears that the SEA and LEA must make it available without qualification. This may be done through a public school program or referral to a nonpublic school. If mainstreaming is required, however, the obligation does not appear to be absolute. Rather, according to the Federal Office of Special Education, it must be provided if existing public services and programs can be restructured, perhaps through locating the preschool programs in a public elementary school or through cooperating with other public agencies, such as Head Start programs, to make mainstreaming available. If this is not available or cannot be done, it appears that school systems would not be required to create preschool programs for nonhandicapped children or to enter into contracts with private schools to meet this mandate. Thus all systems providing preschool programs to handicapped youngsters must be prepared to offer mainstreaming when required to preschool handicapped children, or alternatively, be able to demonstrate that such cannot be made available through restructuring existing services or programs or through cooperative agreements with other public agencies.

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